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No. 93-1054

In the Supreme Court of the United States

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certain *in rem* seizure warrants were overbroad and lacked a probable cause basis.

2. Whether the district court independently determined that there was probable cause to forfeit the *res*.

3. Whether there was sufficient evidence that the forfeited funds were proceeds of narcotics trafficking and/or money laundering.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A75-A166) is reported at 6 F.3d 37. The opinion of the district court (Pet. App. A1-A74) is reported at 801 F. Supp. 984.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1993. A petition for rehearing was denied on October 6, 1993. Pet. App. A167-A170. The petition for a writ of certiorari was filed on December 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 1980, the government filed a civil forfeiture action under 18 U.S.C. 981 and 21 U.S.C. 881 seeking forfeiture of approximately $12 million that was alleged to be narcotics proceeds being laundered through various bank accounts. Petitioners filed claims to the funds and claimed that they were the proceeds of lawful commercial activities. After a jury trial in the United States District Court for the Eastern District of New York, the jury returned a verdict forfeiting approximately $10 million to the government.[1] The court of appeals affirmed. Pet. App. A75-A166.

1. The forfeitures arose out of an effort to impede the drug trafficking money laundering activities of the Cali, Colombia, drug cartel, headed by Jose Santacruz-Londono. The Cali cartel is responsible for importing some 3,000 kilograms of cocaine per month into this country. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its drug proceeds. It moves its funds through the banks by electronic funds transfers (EFTs) for even-

[1] Nine other claimants attempted to prove below that they had a right to the funds in question. They also have filed petitions for a writ of certiorari, which are now pending. See, *e.g.*, *Creaciones Viviana Ltda., et al.* v. *United States*, No. 93-1002; *Abuchaibe Hnos., Ltda.* v. *United States et al.*, No. 93-1018; *Organizacion JD Ltda., et al.* v. *United States et al.*, No. 93-1020; *Industrias Marathon Ltda.* v. *United States et al.*, No. 93-1061; *Manufacturera Del Atlantico Ltda., et al.* v. *United States et al.*, No. 93-1073. A tenth claimant withdrew its claim prior to trial. It too has filed a petition for a writ of certiorari. See *Comercial Samora Ltda.* v. *United States et al.*, No. 93-1019. We responded to all of those petitions in a single brief in opposition, which we filed on February 18, 1994. We are providing petitioner with a copy of that brief.

tual deposit into Colombian bank accounts. Pet. App. A83-A84.

An EFT is begun when a customer's bank sends a message to the transfer system's central computer that states the amount of money to be transferred, the identity of the sending and receiving banks, and the identity of the intended beneficiary. The central computer adjusts the account balances of the sending and receiving banks and generates a debit ticket at the sending bank and a credit ticket at the receiving bank. The receiving bank also notifies the beneficiary of the transfer. If the sending bank and receiving bank are not directly connected to the same network, the transfer must go through one or more intermediary banks. Each of them receives a credit for its own account when it receives the EFT and then a debit when it sends the EFT to the next bank in line. International transactions often require a series of such transfers through one or more intermediary banks. A series of such transfers can occur extremely quickly. Pet. App. A84-A85.

The seizures at issue in this case stemmed from the arrests in Luxembourg on June 28 and 29, 1990, of three associates of Santacruz-Londono. The three men had opened hundreds of bank accounts in Europe and had deposited large sums of money in the accounts for the Cali cartel. Fearing that the arrests would cause the cartel to move its funds to Colombia before they could be confiscated, Luxembourg law enforcement authorities requested several countries, including the United States, to freeze the cartel's funds. During July and August 1990, there was a flurry of EFTs from the accounts. Authorities seized $30 million in Europe, $16 million in Panama, and $12 million in this country. Pet. App. A10-A12, A85-A86.

The funds seized in the United States came from certain bank accounts, as well as dozens of EFTs sent through intermediary New York City banks—Banco Atlantico, Manufacturers Hanover, and The Bank of New York—that had correspondent banking relationships with Panamanian and Colombian banks. After receiving the EFTs, the intermediary New York banks were to credit the accounts of designated correspondent Colombian banks, and the Colombian banks were then to credit the accounts of their customers, the ultimate beneficiaries. Through oral orders and a series of eight *in rem* arrest warrants, federal agents instructed the intermediary New York banks to attach all funds on deposit in the names of various individuals and entities associated with Santacruz-Londono, as well as to inform the agents about all transfers that appeared to be destined for a related third-party beneficiary in Colombia. The New York banks complied with the agents' directions. As a result of the information supplied by the banks, the successive *in rem* complaints each included additional names. Pet. App. A86-A88.

2. Petitioners and the other claimants, all purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to some $6,500,000 of the seized funds, denied the allegations of the forfeiture complaint, and asserted that the monies had been derived from legitimate clothing sales. Pet. App. A88.

After reviewing submissions from both parties, including material submitted *in camera* by the United States, a magistrate judge found that there was probable cause to believe that the funds in question were the proceeds of narcotics trafficking and/or money laundering. Pet. App. A90. The district court later held a separate evidentiary hearing and likewise found that there was probable cause

to seize the funds. *Id.* at A90-A91. The case then went to trial. Corporate and banking records, as well as testimony of witnesses familiar with the Cali cartel, linked Santacruz-Londono's drug proceeds to various Panamanian and Colombian shell corporations. The jury found that most of the seized funds were forfeitable, but that the funds claimed by two claimants were not traceable proceeds of money laundering and narcotics transactions, and that a third claimant was an innocent owner. *Id.* at A91-A93.

3. On appeal, the court of appeals affirmed the district court's rulings in all respects. The court of appeals observed that the government can proceed in three ways to seize property subject to forfeiture under 21 U.S.C. 881. First, the government can follow the process in the Supplemental Rules for Certain Admiralty and Maritime Claims (Supp. R.). Second, the government can obtain a seizure warrant under Fed. R. Crim. P. 41(c). Finally, the government can seize the property under 21 U.S.C. 881(b)(4) without judicial process when the Attorney General has probable cause to believe the property is subject to forfeiture. Pet. App. A98-A99. The court also pointed out that seized property can still be forfeited if the initial seizure was improper. *Id.* at A99-A100.

The court held that the seizures of at least nine of the EFTs "followed the process prescribed by the Supplemental Rules." Pet. App. A100. The court held that the *in rem* complaints were sufficiently particularized, under Supp. R. C(2) and E(2). According to the court, because the complaints named the intermediary banks through which the funds were to be transferred, as well as the intended beneficiaries of the transfers, the complaints described the subject property with requisite particularity. Pet. App. A101-A108. And because the complaints alleged that the funds were part of San-

tacruz-Londono's method of laundering drug proceeds, the complaints specifically alleged the grounds on which the forfeiture claims arose. *Id.* at A103-A107.

The court likewise found that the seizures of 11 fund amounts without warrants were proper under 21 U.S.C. 881(b)(4) because the government "[c]learly" had probable cause to believe that the EFTs were subject to civil forfeiture. According to the court, the prosecutors knew that Santacruz-Londono had been indicted in the United States for his drug and money-laundering activities, and they knew that he "would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his 'businesses' in Colombia." Pet. App. A109.

With respect to petitioners' Fourth Amendment claims, the court below held that exigent circumstances justified the warrantless seizures, because the transactions could be completed within minutes or hours. Pet. App. A113. The court likewise rejected petitioners' arguments that the *in rem* warrants were defective because they were issued without a judicial probable cause determination. The court held that forfeiture seizures do not require such a determination. *Id.* at A113-A117.

The court of appeals also rejected petitioners' arguments that the DEA's subpoenas of financial records from the intermediary banks violated petitioners' rights. The court first reasoned that petitioners' relationship with the intermediary banks was too remote to allow petitioners to claim any expectation of privacy in information about the EFTs. Pet. App. A117-A118. Even if petitioners had had their own accounts with the intermediary banks, the court held, information concerning those accounts would not be protected by the Fourth Amendment, because the Drug Enforcement Administration (DEA) was authorized to make inquiries of the banks,

and the banks were authorized to turn over the information. *Id.* at A117-A120, citing *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and *United States* v. *Miller*, 425 U.S. 435, 440, 445-446 (1976).

The court also rejected petitioners' claims under the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3401 *et seq.* Although the DEA did not give notice to petitioners of the subpoenas to the intermediary banks, the court held that no notice was required under the statute, because petitioners did not hold accounts in their names at the banks, as required by 12 U.S.C. 3401(5). The court pointed out that the seized funds did not come from accounts held in any claimant's name, but rather were wire transfers to be credited to the accounts of Colombian banks that were maintained at the intermediary banks. Petitioners never maintained accounts in their names at the intermediary banks. Pet. App. A122-A126. The court also agreed that, because the only authorized remedy for a violation of the RFPA is a civil penalty, petitioners would not be entitled to suppression of evidence even if the RFPA were violated. Pet. App. A126-A127.

The court also rejected petitioners' claims that the *in rem* warrants did not satisfy the Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, § 105(b), 100 Stat. 1856, which added "electronic communications" to the coverage of the wiretap statute, 18 U.S.C. 2510-2521.[2] The court concluded that the ECPA prohibits interceptions of electronic communications through the use of a device. Since the government did not use any kind of "device" to obtain the EFTs here, no

[2] The court noted that "[t]he statute is directed at regulating surveillance activities," Pet. App. A132, but assumed arguendo it also applied to EFTs. *Id.* at A133.

interception occurred within the meaning of the statute. Pet. App. A136-A137.

In addition, the court held that the government had established that there was probable cause to believe that the funds represented proceeds traceable to drug transactions. The court ruled that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking," and "[e]ach one of the claimants was linked to Santacruz-Londono through the testimony of a least one witness." Pet. App. A150-A152. In so ruling, the court adhered to its own established precedent that the government was not required to "link the monies to any one particular transaction." *Id.* at A148.[3]

ARGUMENT

1. Petitioners contend (Pet. 18-29) that the *in rem* warrants for seizure of the EFTs were overbroad, lacked a probable cause foundation, and were wrongly issued without judicial authorization.

a. The forfeiture complaints alleged that Santacruz-Londono had caused substantial amounts of money that were proceeds of drug trafficking and money laundering to be transferred through the defendant accounts for ultimate credit to accounts of the various claimants. In addition, an international letter rogatory was incorporated by reference in the complaint. That letter rogatory described in greater detail the investigation of Santacruz-Londono, the arrests of three cartel members in

[3] The court of appeals rejected petitioners' other arguments, including that the EFTs did not qualify as a seizable *res*, and that petitioners did not satisfy their burden of proving that they were innocent owners of the funds. Petitioners do not renew those claims here.

Luxembourg, and the use of Panamanian and Colombian shell corporations to disguise the illegal nature of the proceeds. Pet. App. A105-A106. Moreover, petitioners filed claims and responses to the seventh amended complaint without moving for a more definite statement. *Id.* at A107-A108. In those circumstances, the court of appeals correctly held that, because the *in rem* complaint described the intermediary banks through which the funds were transferred as well as the intended beneficiaries, the complaint described the subject property with sufficient particularity to enable petitioners to investigate the facts and frame a responsive pleading under Supp. R. E(2)(a). Pet. App. A106-A107.

b. The court of appeals correctly held that the government had probable cause for the warrantless seizures of the funds. Pet. App. A108-A110. The court observed that government agents "knew that Santacruz-Londono, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his 'businesses' in Colombia." *Id.* at A109. When wire transfers addressed to suspect beneficiaries in Colombia were received by New York banks, the government had probable cause to make the seizures.

c. Petitioners also argue (Pet. 24-29) that the Fourth Amendment required prior judicial authorization of the warrants in this case. But petitioners had no expectation of privacy in the EFTs. The transfers were intended to be credited to the accounts of Colombian banks, not to petitioners' accounts in New York or elsewhere. Petitioners could have had no expectation of privacy in the accounts maintained by Colombian banks in New

York. Acccordingly, seizure of the funds could not have violated any Fourth Amendment rights of petitioners.[4]

In any event, the court of appeals correctly determined that seizures under the forfeiture laws do not require a prior judicial authorization. In *United States* v. *$8,850*, 461 U.S. 555, 562 n.12 (1983), this Court recognized that forfeiture of highly mobile personal property represents an "extraordinary situation" that justifies seizure without a prior judicial determination that the seizure is justified.[5] Accord *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (yacht might have disappeared had a preseizure hearing been required). Indeed, the fund transfers in this case would have been completed within very short periods of time—minutes or hours—and the funds would have been irrevocably transferred to Colombia. Hence, exigent circumstances justified the seizures, and prior judicial authorization was not needed. *United States* v. *Lingenfelter*, 997 F.2d 632, 640-641 (9th Cir. 1993).

2. Petitioners argue (Pet. 29-33) that the district court, in making its probable cause finding, wrongly

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[4] Petitioners rely (Pet. 25 & n.4) on the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, for their claim that they have an expectation of privacy in the EFTs. But the court of appeals correctly pointed out that the RFPA's protections apply only to "those who maintain accounts in their names at financial institutions." Pet. App. A125. Petitioners did not satisfy that requirement.

[5] The Court recently reached the opposite conclusion in the context of forfeitures of real property. *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993). Since the subject of the claims in this case was personal property, the Court's decision in *James Daniel Good Real Property* does not cast doubt on the court of appeals' conclusion here.

relied on evidence adduced at the *in camera* hearing before the magistrate judge. That claim is incorrect.

There were two pretrial determinations of probable cause. First, a magistrate judge held a hearing in order to determine whether the court should stay discovery in the civil action filed by other claimants. See Gov't C.A. Br. 42. That hearing was properly conducted *ex parte* and *in camera*, because the government submitted information about a continuing criminal investigation. Based on public submissions, as well as materials submitted in connection with the closed hearing, the magistrate judge found probable cause.[6] The district court later held a separate pretrial hearing, at petitioners' request, to determine whether the government had shown probable cause for the forfeitures.

Petitioners claim (Pet. 12-13, 29-30) that the district court found that the government had not presented sufficient information at the public pretrial hearing to warrant a finding of probable cause. According to petitioners, the court therefore must have based its probable cause finding on the *ex parte* hearing before the magistrate judge. That claim is mistaken. First, the district court made its statements concerning lack of proof in connection with another claimant, not in connection with the evidence against any of the petitioners. See C.A. App. A1261. After the hearing concluded, the district court made a finding that the government had probable cause to forfeit the seized funds, and the court entered a written order to that effect. *Id.* at A1296-A1298, A3350-A3351. Beyond that, the district court later expressly

[6] During a conference with the parties, the magistrate judge asked whether there was any objection to his consideration of the sealed materials, in connection with his probable cause determination. No party objected. Gov't C.A. Br. 43 n.16; C.A. App. A646.

stated that it had based its probable cause determination solely on the public record, not on the *ex parte* submissions. *Id.* at A3697; see Gov't C.A. Br. 42. And in its written post-trial opinion, the court reiterated that it had made a *de novo* determination of the probable cause issue. Pet. App. A20. Hence, there is no basis for petitioners' claim that the district court rested its findings on the *in camera* hearing.

3. Petitioners also argue (Pet. 33-39) that the forfeiture of the funds "shocks the conscience" because the United States was able "to seize and forfeit the 'res' without connection of the 'res' to narcotics trafficking." Pet. 36. As the court of appeals concluded, the United States had ample probable cause to seize all of the funds at issue, and further review to consider the correctness of that fact-bound conclusion would not in any event be warranted. Moreover, a two-month jury trial was held after the probable cause hearing. Although petitioners argued at trial "that the government failed to submit evidence that the 'sources' and 'destinations' of the seized funds were connected to narcotics activities," the court of appeals recognized that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking." Pet. App. A151. The Constitution does not preclude forfeiture of funds in those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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